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In the
Supreme Court of the United States

October Term, 1996

City of St. Petersburg, Florida
Petitioner,

v.

William A. Bowen, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

On Petition for a Writ of Certiorari
to the District Court Of Appeal of Florida
Second District

PETITION FOR A WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED FOR REVIEW

Does A Municipal Nuisance Abatement Board Order Requiring The One-Year Closure Of A Building That Is A Public Nuisance Because Of Its Continual Use In Illegal Drug Sales Require Compensation Under The Constitution's Fifth Amendment?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, the City of St. Petersburg, Florida, and Respondent, William A. Bowen, as Trustee of the William A. Bowen Trust Agreement. The State of Florida filed an amicus brief.

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No. 96_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF ST. PETERSBURG, FLORIDA,
Petitioner,

v.

WILLIAM A. BOWEN, as Trustee of the William A. Bowen Trust Agreement,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

The City of St. Petersburg respectfully petitions for a writ of certiorari to review the judgment and opinion of the District Court of Appeal Second District, State of Florida in this case.

OPINIONS BELOW

The opinion of the District Court of Appeal (App., *infra*, 1a) is reported at 675 So. 2d. 626 (Fla. Dist. Ct. App. 1996). The opinion of the Circuit Court of Pinellas County, Florida is unreported and is incorporated into the District Court of Appeal opinion (App., *infra*, 4a). The Findings of Fact, Conclusions of Law and Order of the Nuisance Abatement Board of the City of St. Petersburg, Florida (App., *infra*, 13a) are unreported.

JURISDICTION

The District Court of Appeal entered its judgment on May 22, 1996 (App., *infra*, 1a). The Supreme Court of Florida

declined to exercise its jurisdiction on August 29, 1996 (App., *infra*, 12a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION, STATUTE AND ORDINANCE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "nor shall private property be taken for public use, without just compensation."

Section 893.138, Florida Statutes is set forth in the Appendix (App., *infra*, 15a).

Sections 19-66 through 19-71 of the St. Petersburg City Code are set forth in the Appendix (App., *infra*, 18a).

STATEMENT OF THE CASE

In 1987, the Florida legislature authorized municipalities to create administrative boards to hear complaints about, *inter alia*, drug-related public nuisances. 1987 Fla. Laws ch. 87-243, § 7. Such boards are empowered to declare a place or premises to be a public nuisance and to enter an order to abate such a nuisance. The order may require the closing of the premises for up to one year. Pursuant to this statutory scheme, the City of St. Petersburg created a Nuisance Abatement Board (NAB) in 1989. St. Petersburg, Fla., Ordinance No. 1137F, §1 (Nov. 2, 1989).

William A. Bowen acquired The Lorraine Apartments, a fifteen-unit building located in St. Petersburg, in 1991. In 1993, the NAB notified Bowen that it would hold a public hearing concerning allegations of drug-related activity at The Lorraine Apartments. After the hearing, the NAB found that The Lorraine Apartments were used on four occasions within a six-month period as the site for the unlawful sale or delivery of cocaine. Accordingly, the NAB declared The Lorraine Apartments to be a public nuisance and, to abate the nuisance, ordered the premises closed for one year. Bowen did not challenge the validity of the NAB's actions.

Instead, Bowen filed a complaint in the Circuit Court of Pinellas County, asserting that he had suffered a taking of his private property for which just compensation was due. Bowen moved for partial summary judgment on the issue of just compensation under the United States Constitution. The Circuit Court found that the NAB's order had deprived Bowen of all economic use of The Lorraine Apartments for one year. Granting Bowen's motion, the Circuit Court rejected the City of St. Petersburg's contention that the abatement of illegal drug activity required no compensation. The Circuit Court concluded that *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), mandated the payment of just compensation.

On appeal, the District Court of Appeal adopted the Circuit Court's opinion and affirmed. The Supreme Court of Florida declined to exercise its jurisdiction on August 29, 1996.

REASONS FOR GRANTING THE PETITION

This case presents a timely opportunity for the Court to reaffirm and strengthen the principle set out in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-492 (1987), that where property is being used for an illegal purpose, in this case the sale of drugs, then state and local governments may protect the community by abating such use as a public nuisance without violating the Just Compensation Clause of the Fifth Amendment.

The District Court of Appeal stated that "*Lucas* [*v. South Carolina Coastal Council*] severely restricted the nuisance exception by limiting it to common law nuisances." *Bowen*, 675 So. 2d at 631. The District Court of Appeal's decision is contrary to the Fifth Amendment and misconstrues *Lucas* and other decisions of this Court. Moreover, the District Court of Appeal's decision creates a conflict among state courts and threatens the ability of local and state governments to battle drug, prostitution, and gang-related activity, as well as housing and health code violations that rise to the level of a public nuisance. It defies logic and can only lead to government by purchase to conclude that the Just Compensation Clause of the Fifth Amendment requires the public at large to bear the burden when government temporarily interrupts the use of property to abate as a public nuisance a clearly illegal use of property.

I. The District Court of Appeal's Interpretation of the Fifth Amendment's Requirements Regarding Just Compensation Conflicts With This Court's Decisions.

Bowen radically departs from this Court's precedents. This Court has never suggested that the abatement of traditional public nuisances (whether statutorily or common law based) such as illegal drug activity requires the payment of just compensation. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987) (noting that no compensation is due when a State "diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance")[1] Indeed, just this year this Court held that the complete forfeiture of nuisance-related property does not implicate the Takings Clause. *Bennis v. Michigan*, 116 S. Ct. 994, 1001 (1996). It would be anomalous to call for compensation when a governmental body seeks to abate a nuisance through less invasive means: a one-year suspension of the property's use.

The Circuit Court found that the NAB's order had "deprived [Bowen] of all economic use of this property" during the one-year period. *Bowen*, 675 So. 2d at 631. *Lucas* instructs that in such cases a governmental entity need not provide compensation if it "duplicate[d] the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally[.]" 505 U.S. at 1029. The NAB's order clearly falls within the public nuisance exception delineated in *Lucas*. Pursuant to a grant of authority from the Florida legislature, the NAB merely acted to abate a nuisance that affected the public.

Contrary to the District Court of Appeal's suggestion, *Lucas* did not limit the public nuisance defense to common

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[1] Recently, the traditional power to abate a public nuisance without running afoul of the Fifth Amendment was again recognized in *Porter v. DiBlasio*, 93 F.3rd 301, 310 (7th Cir. 1996), which correctly applied this Court's precedents. The analysis in *Porter* further demonstrates the radical departure in this case.

law public nuisances. The Fifth Amendment, as *Lucas* explains, is concerned about fair treatment for private property owners. There are certain circumstances in which the public at large, rather than an individual property owner, should bear the costs of a governmental action or program. As *Lucas* emphasizes, this is especially the case where government imposes new restrictions on the use of property and thereby destroys all value in that property. *Id.* at 1029-30. *Lucas* noted, however, the "unexceptional" proposition that "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by . . . 'existing rules or understandings.'" *Id.* at 1030. Clearly, existing rules and understandings, as codified in the Florida legislature's pronouncements regarding public nuisances, precluded property from being used in repeated illegal drug transactions.

Indeed, the illegal activities in this case have been considered public nuisances in this jurisdiction even before Florida entered the Union. In 1832, for example, the Florida territorial legislature recognized as public nuisances activities that "tend to annoy the community or injure the health of its citizens in general, or to corrupt the public morals." 1832 Fla. Terr. Laws No. 55, § 47. In 1917, the Florida legislature offered specific examples of public nuisances: "any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or *any place where any law of the State of Florida is violated*[.]" 1917 Fla. Laws ch. 7367, § 1 (emphasis added). In 1969, the Florida legislature deemed as public nuisance any place, including any building, that is "used for the illegal keeping, selling or delivery" of illegal drugs. 1969 Fla. Laws ch. 69-364, § 1 (codified at Fla. Stat. § 823.10). Finally, in 1987, the Florida legislature provided local governments a new enforcement mechanism to combat drug-related nuisances by authorizing nuisance abatement boards, as quasi-judicial bodies, to order the closure of a building for up to one year if the building constituted a public nuisance because of drug activity. 1987 Fla. Laws ch.

87-243, § 7 (codfied at Fla. Stat. § 893.138). Obviously, any "objectively reasonable application" of the principles articulated in this statutory history compels the conclusion that the use of property as an illegal drug market does not inhere in an owner's title. See *Lucas*, 505 U.S. at 1032 n.18.

An underlying theme of the Fifth Amendment (and in *Lucas*) is that just compensation may be due if government changes the rules governing property and thereby interferes with a property owner's reasonable investment-backed expectations. Property owners "must not be frustrated by a shifting background of state law." *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring in the judgment). In this case, however, Bowen may not claim that he is the victim of "a shifting background of state law." He acquired The Lorraine Apartments in 1991. For over 150 years prior to Bowen's acquisition of The Lorraine Apartments, it had been the law of Florida that a public nuisance is an activity that annoys the community, injures its citizens' health, or corrupts the public's morals. For over 70 years, it had been the law of Florida that a public nuisance included any building where any law of the State of Florida is violated. For a dozen years, it had been the law of Florida that a public nuisance included any place used for illegal drug activity. In light of these existing rules and understandings, Bowen may not claim that his expectations were interfered with or that he has been treated unfairly. Thus, the District Court of Appeal's decision to award just compensation in these circumstances is contrary to this Court's decisions.[2]

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[2]The District Court of Appeal also incorrectly identified the nature of the nuisance activity for purposes of Fifth Amendment analysis. The District Court of Appeal focused on the property's use as an apartment building, rather than the building's use in drug activity. While the District Court of Appeal's observation that "[t]here is no common law doctrine which prohibits the use of a building for rental purposes" is undoubtedly true, it is irrelevant. The appropriate inquiry is whether a building constitutes a nuisance because of its use in drug activity, including the repeated sale of cocaine. With the issue properly framed, the answer is clear: a building (whether apartment building or free-standing house) that is the location of repeated illegal drug transactions constitutes a public nuisance. *Cf. Bennis v. Michigan*, 116 S. Ct. 994 (1996) (automobile declared to be a public nuisance as a consequence of its use in solicitation of prostitution).

II. The District Court of Appeal's Decision Creates a Conflict Among State Courts and Threatens the Ability of Government to Abate Traditional Public Nuisances.

When abating traditional public nuisances, state and local governments are frequently authorized to destroy or close down property. No other state court has held that the Fifth Amendment requires the payment of just compensation in such situations. *See, e.g., Minot v. Freelander*, 426 N.W.2d 556 (N.D.1988) (demolition of house because of unsanitary conditions does not constitute a taking); *Starzenski v. Elkhart*, 659 N.E.2d 1132 (Ind. Ct. App.), *petition for cert. filed*, 65 U.S.L.W. 3181 (U.S. Aug. 29, 1996) (No. 96-350) (removal of trash and debris from property is not a taking); *Raynor v. Maryland Dept. of Health and Mental Hygiene*, 110 Md. App. 165, 676 A.2d 978 (1996) (destruction of pet ferret that bit child is not a compensable taking). The District Court of Appeal's decision that a one-year closure of a building that was the site of repeated illegal drug transactions requires just compensation creates an obvious and serious conflict.

The greatest immediate impact will be felt within the State of Florida. The decision will discourage all nuisance abatement boards in Florida from ordering the temporary closure of crack houses, houses of prostitution, and dwellings used by street gangs. To do so in light of *Bowen* would invite a takings claim. Moreover, the decision of a district court of appeal is binding on all trial courts in the State unless it is subsequently overruled by the Florida Supreme Court or reversed by this Court. *Pardo v. Florida*, 596 So. 2d 665, 666 (1992).

Finally, allowing *Bowen* to become part of takings jurisprudence will threaten the viability of nuisance abatement programs in other States as well. At least twenty States statutorily define a public nuisance to include buildings used in illegal drug transactions.[3] These States generally authorize, as part of the abatement process, the issuance of an order that closes down the premises.[4] *Bowen* should not be permitted to place at risk these critical efforts of State and local governments to combat activities that have long been regarded as threats to a community's well-being.

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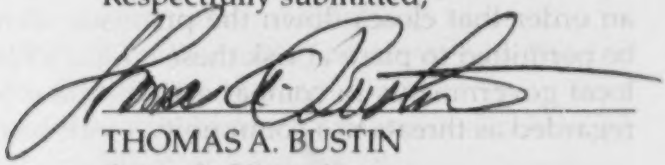
[3]Ala. Code § 6-5-155.1(3) (Supp. 1996); Alaska Stat. § 09.50.170 (1995); Ark. Code Ann. § 16-105-402 (Michie Supp. 1995); Cal. Health & Safety Code § 11570 (West 1991); Colo. Rev. Stat. Ann. § 16-13-303 (West Supp. 1996) Conn. Gen. Stat. Ann. § 21a-259 (West 1994); Ill. Comp. Stat. Ann. ch. 720, ¶ 5/37-1 (West 1993); Mass. Ann. Laws ch. 139, § 16 (Law. Co-op. 1995); Mich. Comp. Laws Ann. § 600.3801 (West 1987); Miss. Code Ann. § 41-29-309 (1993); Mo. Ann. Stat. § 195.130 (Vernon 1996); N.H. Rev. Stat. Ann. § 318-B:16 (Supp. 1995); N.J. Stat. Ann. § 24:21-35 (West Supp. 1996); N.C. Gen. Stat. § 19-1.2 (Michie Supp. 1996); Or. Rev. Stat. § 105.555 (1989); 42 Pa. Cons. Stat. Ann. § 8382 (West Supp. 1996); Utah Code Ann. § 78-38-9 (1996); Va. Code Ann. § 18.2-258 (Michie 1996); Wash. Rev. Code Ann. § 7.43-010 (West 1992); Wis. Stat. Ann. § 823.113 (West 1994).

[4]Ala. Code § 6-5-156.3 (Supp. 1996); Alaska Stat. § 09.50.210 (1995); Ark. Code Ann. § 16-105-412 (Michie Supp. 1995); Cal. Health & Safety Code § 11573.5 (West 1991); Colo. Rev. Stat. Ann. § 16-13-309 (1990); Ill. Comp. Stat. Ann. ch. 720, ¶ 5/37-4 (West 1993); Mass. Ann. Laws ch.139, § 16A (Law. Co-op. 1995); Mich. Comp. Laws Ann § 600.3810 (West 1987); Miss. Code Ann. § 95-3-15 (1993); Mo. Ann. Stat. § 195.130 (Vernon 1996); N.H. Rev. Stat. Ann. § 544:31 (Supp. 1974); N.J. Stat. Ann. § 2C:33-12.1(West 1996); N.C. Gen. Stat. § 19-5 (Michie Supp. 1996); Or. Rev. Stat. § 105.580 (1989); 42 Pa. Cons. Stat. Ann. § 8389 (West Supp. 1996); Va. Code Ann. § 18.2-258.01 (Michie 1996); Wash. Rev. Code Ann. § 7.43.090 (West 1992); Wis. Stat. Ann. § 823.113 (West 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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October, 1996

APPENDIX A

CITY OF ST. PETERSBURG,
Florida, Appellant,

v.

William A. BOWEN, as Trustee of the William A. Bowen Trust Agreement, Appellee.

No. 95-03437.

District Court of Appeal of Florida,
Second District.

May 22, 1996.

Rehearing Denied June 18, 1996.

Michael S. Davis, City Attorney, and John Thor White, Assistant City Attorney, St. Petersburg, for Appellant.

Robert A. Butterworth, Attorney General, and Wendy S. Morris, Assistant Attorney General, Tallahassee, for Amicus Curiae State of Florida

Robert H. Willis, Jr. of Skelton, Willis Bennett, St. Petersburg, for Appellee.

CAMPBELL, Acting Chief Judge.

Appellant, City of St. Petersburg, Florida (City), challenges the summary judgment which resolved the issue of liability in favor of appellee, William A. Bowen, as Trustee of the William A. Bowen Trust Agreement (Bowen), in Bowen's inverse condemnation action against the City. We have jurisdiction pursuant to Rule 9.130(a)(3)(C)(iv). After a review of the record before us, we conclude that the trial judge's summary judgment was a correct application of the pertinent law to the undisputed facts of the case. We affirm.

In 1991, Bowen acquired ownership of The Lorraine Apartments in St. Petersburg. The City, in 1993, filed an administrative complaint with its Nuisance Abatement Board

(NAB) against Bowen alleging that The Lorraine Apartments constituted a nuisance by virtue of the purported use of drugs by tenants and other persons at the property. No unlawful activity on the part of Bowen was alleged. The City's complaint was filed pursuant to section 893.138, Florida Statutes (1991) and the City's enabling ordinance which substantially tracks the statute. *See* 19-66 to 19-71, St. Petersburg City Code. Section 893.138 provides as follows:

(1) Any place or premises that has been used on more than two occasions, within a 6-month period, as the site of the unlawful sale or delivery of controlled substances or as the site of a violation of s. 796.07, or any place or building used by a youth and street gang for the purpose of conducting a pattern of youth and street gang activity may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section.

(2) Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (1). Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his last known address. After a hearing in which the board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his defense, the board may declare the place or premises to be a public nuisance as described in subsection (1).

(3) If the board declares a place or premises to be a public nuisance, it may enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

(4) An order entered under subsection (3) shall expire after 1 year or at such earlier time as is stated in the order.

(5) An order entered under subsection (3) may be enforced pursuant to the procedures contained in s. 120.69. This subsection does not subject a municipality that creates a board under this section, or the board so created. to any other provision of chapter 120.

(6) The board may bring a complaint under s 60.05 seeking temporary and permanent injunctive relief against any nuisance described in subsection (1).

(7) This section does not restrict the right of any person to proceed under s. 60.05 against any public nuisance.

After a hearing on the City's complaint, the NAB ordered The Lorraine Apartments closed for a period of one year effective August 16, 1993. As a consequence of the ruling, Bowen was unable to put The Lorraine Apartments to any economic use and the property's fair market value was substantially diminished. Bowen has received no compensation from the City.

On August 11, 1993, Bowen filed a complaint for inverse condemnation against the City in circuit court. Bowen alleged that the closure of The Lorraine Apartments constituted a taking for a public purpose requiring just compensation under the Fifth and Fourteenth Amendments of the United States Constitution and article X, section 6, and article I, section 9 of the Florida Constitution. The City moved to dismiss Bowen's complaint, asserting in part that an action for inverse condemnation may not arise from a temporary taking. On January 19,1994, the trial judge granted the City's motion by finding that "the closing of The Lorraine Apartments, for one year, is a temporary taking. An action for inverse condemnation does not arise from a temporary taking." From that decision, Bowen filed an appeal and, on September 28, 1994, this court reversed per curiam, citing *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla.1994). *Bowen v. City of St. Petersburg, Fla.*, 642 So. 2d 837 (Fla. 2d DCA 1994).

On remand, both the City and Bowen moved for summary judgment upon stipulated facts.

On July 6, 1995, summary judgment was entered for Bowen. The trial judge found that the City imposed a temporary loss of all economic use of the apartments. The trial court also held that use of the property as an apartment house was not a nuisance at common law. The trial court concluded Bowen was entitled to compensation for the one-year taking of his property with the total amount of such compensation to be determined subsequently by the court.

At the outset, we note that the action of closing completely the apartments for one year was, in regard to Bowen's property rights, one of the most invasive methods of abating the purported nuisance that was available. In this appeal, we are presented with the narrow issue of whether the complete closure of The Lorraine Apartments for one year in order to curtail the illegal use of drugs by tenants and others was a compensable taking by the City.

As support for the summary judgment for Bowen, the trial judge has entered in "Order Granting Summary Judgment In Favor Of Plaintiff, William A. Bowen, Trustee." That order is complete, concise, scholarly and well-grounded. We see no need to attempt to add our reassessment to those findings and conclusions and, therefore, set forth below the trial judge's order, in full, and adopt it as our own:

> Both Plaintiff, William A. Bowen, Trustee and Defendant, City of St. Petersburg, have filed Motions for Summary Judgment and submitted this case for decision as a matter of law on the stipulated facts as revealed in the record. Neither party asserts that there are any controverted issues of fact.
>
> This is a Complaint for Inverse Condemnation. The City of St. Petersburg, through its Nuisance Abatement Board ordered the 15 unit apartment building, Lorraine Apartments, on land owned by Plaintiff, to be shut down for a one year period. The land and building can be put to no other use during this one year close down period.

The plaintiff does not contest the findings of the Nuisance Abatement Board (NAB) nor does the complaint allege that the one-year closure was not a proper exercise of police power. Plaintiff merely alleges that the closure is a compensable taking for which there has been no payment. He does not allege that the NAB findings of fact were unfounded or that its closure order was contrary to the Ordinance of the City.

The Florida Supreme Court in *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So. 2d 622 (Fla.1990) and again in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation*, 640 So. 2d 54 (Fla.1994) has clearly recognized that if the state, through the use of its police power, deprives the owner of property of the economically viable use of his property, then that property owner must be compensated. Also, in these cases, the Florida Supreme Court recognized that temporary takings are compensable.

Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation.

> [T]he state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner. *Joint Ventures*, 563 So. 2d at 624 (footnotes omitted).

Based upon the *A.G.W.S.* case and the *Joint Ventures* case, as well as numerous United States Supreme Court cases, if the closure of the Lorraine Apartments by the nuisance abatement board resulted in depriving the owner of all economic use of the property, even if this deprivation was temporary, then as a matter of law there

is deemed to have been a taking and the property owner is entitled to be compensated for the economic loss suffered.

First English [Evangelical] Lutheran Church v. County of Los Angeles, 482 U.S. 304 [107 S.Ct. 2378, 96 L.Ed.250] (1987) address the issue of compensating a landowner for a temporary taking. In that case it was held that:

> A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation.
>
> "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation. Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of the fair value for the use of the property during such period would be a constitutionally insufficient remedy.

The City has placed great weight in its theory that by use of its police power it can avoid having to compensate the plaintiff even if the action of the NAB deprives the plaintiff of all economic use of his property. This belief by the City is misplaced.

We look for guidance to the case of *Lucas v. South Carolina Coastal Council*, [505 U.S. 1003] 112 S.Ct. 2886 [120 L.Ed.2d 798] (U.S.1992). In that case, Mr. Lucas owned some beach front property in South Carolina that he wished to develop.

The South Carolina legislature subsequent to his acquisition of the property passed a statute called "The Beachfront Management Act" which essentially prevented Mr. Lucas from developing his property. Mr. Lucas then filed suit contending the legislature effected a taking of his property without just compensation.

Mr. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. The Trial Court agreed.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina's beaches."

The South Carolina Supreme Court ruled that when a regulation respecting the use of property is designed to prevent serious public harm[1], no compensation is due under the takings clause[2] regardless of the regulation's effect on the property's value. The United States Supreme Court disagreed with that ruling and reversed.

---

[1]In the case at bar there is no doubt that the ordinance is designed to prevent serious public harm by impacting on the use or sale of illegal drugs.

[2]The complaint in the case at bar alleges that compensation is required under the taking clauses of both the 5th Amendment and Art. X, § 6(a) of the Florida Constitution and generally as a matter of 'due process'.

There is no doubt that the 5th Amendment taking clause is applicable to the states through the 14th Amendment. *Penn Central Transportation Co., et al., v. NYC, et al.*, [438 U.S. 104, 108, fn 3, 98 S.Ct. 2646, 2650 fn 3] 57 L.Ed.2d 631. 659 fn 3: reh den [439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (— [1978]). *Penn Central* also informs that the term 'property' is not the physical thing; rather it is the ***group of rights*** inherent in the citizen's relationship to the physical thing. such as the right to possess, use, and dispose of one's land. At issue then is the deprivation to the owner, not the accretion to the sovereign.

The United States Supreme Court held that if a state or municipality seeks to sustain a regulation that deprives a landowner of all economically beneficial use, it must compensate the owner unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interest was not part of his title to begin with." In other words, unless the government can show that the landowner had no reasonable expectation of the proposed use when he acquired the property, the owner must be compensated for denial of that use.

In order to prevail on its affirmative defense of the nuisance exception, the City has the burden of proving that when Mr. Bowen purchased the property, he had no reasonable expectation that the Lorraine Apartments could be used as rental apartments, as that is the use which has now been proscribed.

The *Lucas* case limits the nuisance exception to those cases involving a common law nuisance. In the present case, there is no common law nuisance being prevented by the closure. The prohibited activity was *any* use of the apartment building. The NAB order did not really proscribe any particular nuisance, such as would be done by enjoining the sale or use of drugs on the premises. Such an injunction would leave other legal uses available to the Plaintiff, but the order involved here left no use available.

There is no common law nuisance doctrine which prohibits the use of a building for rental purposes. The nuisance exception applies only to restrictions to use which were inherent in an owner's fee simple estate; a use which was not part of his title initially.

In *Lucas*, the Court recognized two categories of regulatory action which are compensable without inquiry into the public interest advanced in support of the restraint: (1) where the regulation compels the landowner to suffer a physical invasion upon the property, or (2) where the regulation denies all economically beneficial or productive use of the land. It is the second category of actions under which Plaintiff claims relief in the instant case.

Lucas held that "[i]n the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life. Total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." Id. [at 1017, 112 S.Ct.] at 2894, citing *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 [101 S.Ct. 1287, 1304, 67 L.Ed.2d 551] (1981).

Lucas further states that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of a common good, that is, to leave his property economically idle, he has suffered a taking. *Id* .[at 1019, 112 .Ct.] at 2895. In these situations, "the functional basis for permitting the government to effect property values by regulation, without compensation, does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Id*

There can really be no question that by virtue of its closing order, the Nuisance Abatement Board has deprived the Plaintiff of all economic use of this property. The property, a 15 unit apartment building, can be put to no other use during the close down period. If deprived of all economic use, a taking has occurred. The law is equally clear that a temporary taking is compensable. In *A.G.W.S.*, supra, at 58, the court said:

> "A taking occurs where regulation denies substantially all economically beneficial or productive use of land. Moreover, a temporary deprivation may constitute a taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

The only real issue in this case is whether the nuisance exception is applicable. Prior to the *Lucas* decision, the nuisance exception argument was a viable defense in many

cases, although not automatic. *Lucas* severely restricted the nuisance exception by limiting it to common law nuisances.

The fact that the City did not take title to the Bowen property (it was merely closed for one year) does not defeat the 'taking' aspect of plaintiff's claim in this case.

In *A.G.W.S.*, supra, the court said at 57, "... government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without compensation, in violation of the just compensation clause. "'[t]he government action is invalid absent compensation. and so government may either abandon its regulation or validate its action by payment of appropriate compensation, i.e., by exercising its power of eminent domain."

During World War II private property was appropriated by the United States. Though the takings were temporary there was no question that compensation would be required for the Government's interference with the use of the property. See the case of *Kimbal [Kimball] Laundry Co. v. United States*, 388 [338] U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 [1949]; *United States v. Petty Motor* 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 [1946]; *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311[1945].

If the City of St. Petersburg wants to wage a war on drugs in part by means of this type of temporary taking then the City will be required to pay landowners just compensation.

Invalidation of the ordinance is not a sufficient remedy to meet the demands of the Just Compensation Clause under the Fifth Amendment of the U.S. Constitution or under Art. X, § 6(a) of the Florida Constitution.

As the Florida Supreme Court in *Joint Ventures* noted:

> "The state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner."

The Court concludes that Plaintiff is entitled to a summary judgment order to the effect that he is entitled to compensation for the one year taking of his property. He is entitled to payment of the fair value for the use of the property for one year. The manner in which the total amount of compensation will be fixed has not yet been determined. The parties may, by motion, present this issue to the Court.

Affirmed.

FRANK and BLUE, JJ., concur.

APPENDIX B

Supreme Court of Florida

THURSDAY, AUGUST 29, 1996

CITY OF ST. PETERSBURG, FLORIDA,
Petitioner,

v.

WILLIAM A. BOWEN, etc.,
Respondent.

CASE NO. 88,373

District Court of Appeal,
2nd District - No. 95-03437

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

Respondent's Motion for Attorney's Fees is granted; and said attorney is hereby allowed a fee of one thousand dollars ($1,000.00) for services in this Court, said sum to be paid to said attorney by petitioner after final disposition of this cause.

KOGAN, C.J., OVERTON, SHAW, GRIMES and HARDING, JJ., concur

TC
cc: Hon. William A. Haddad, Clerk
Hon. Karleen F. DeBlaker, Clerk
Hon. Horace A. Andrews, Judge

Mr. Michael S. Davis
Mr. Thomas A. Bustin
Mr. Robert H. Willis, Jr.
Ms. Wendy S. Morris

APPENDIX C

NUISANCE ABATEMENT BOARD OF THE CITY OF ST. PETERSBURG. FLORIDA

COMPLAINT NO. 93-006

CITY OF ST. PETERSBURG,
Petitioner,

vs.

WILLIAM A. BOWEN, Trustee
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE came on for public hearing before the Nuisance Abatement Board on July 14, 1993, after due notice to the Respondent, and the Board having duly considered all testimony under oath, evidence received, and heard arguments thereupon, issues its Findings of Fact, Conclusions of Law, and Order as follows:

I. FINDINGS OF FACT

1. The place or premises located at 324 Grove Street North, St. Petersburg, Florida was used on more than two (2) occasions as the site for the unlawful sale or delivery of controlled substances, to wit: cocaine.

2. The evidence proved that detectives from the St. Petersburg Police Department, either using a Confidential Informant or directly, made purchases of cocaine on four occasions, all within a six-month period.

3. The Board has jurisdiction and the owner of the property, Mr. William A. Bowen, Trustee was properly notified of the hearing.

II. CONCLUSIONS OF LAW

1. St. Petersburg City Ordinance 1137-F (Code Sections 16-96 through 19-71) and Section 893.138, Florida Statutes, provide that any place or premises which has been used on more than two (2) occasions as the site of the unlawful sale or delivery of controlled substances may be declared to be a public nuisance, which public nuisance may be abated pursuant to the procedures provided in the aforementioned provisions of the St. Petersburg, City Ordinance and the Florida Statutes.

2. The Board hereby declares that the place or premises located at 324 Grove Street North, St. Petersburg, Florida constitutes a public nuisance as described by Ordinance and Statute.

Based upon the foregoing Findings of Fact, and Conclusions of Law, it is hereby ORDERED:

A. The premises located at 324 Grove Street North, St. Petersburg, Florida is ordered closed, effective August 16, 1993, for a period of one (1) year, after which this Order shall become null and void. The 30 day time period for closure of the property is granted to permit existing tenants an opportunity to find other housing. Further, between July 14, 1993 and August 14, 1993, no portion of the property may be rented to a new tenant nor shall any existing tenant's lease be extended during this time period.

B. The Board retains jurisdiction to enforce or modify the provisions of this order.

DONE and ORDERED in St. Petersburg, Pinellas County, Florida this, 20th day of July, 1993.

/S/

Catherine C. Prats
Chairman, N.A.B.

APPENDIX D

893.138. Local administrative action to abate drug-related or prostitution-related public nuisances and youth and street gang activity

(1) Any place or premises that has been used on more than two occasions, within a 6-month period

(a) As the site of a violation of s. 796.07;

(b) As the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(c) On one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance; or

(d) Any place or building used by a youth and street gang for the purpose of conducting a pattern of youth and street gang activity may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section.

(2) Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (1). Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his last known address. After a hearing in which the board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his defense, the board may declare the place or premises to be a public nuisance as described in subsection (1).

(3) If the board declares a place or premises to be a public nuisance, it may enter an order requiring the owner of such place or premises to adopt such procedure as may be

appropriate under the circumstances to abate any such nuisance or it may enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

(4) An order entered under subsection (3) shall expire after 1 year or at such earlier time as is stated in the order.

(5) An order entered under subsection (3) may be enforced pursuant to the procedures contained in s. 120.6. This subsection does not subject a municipality that creates a board under this section, or the board so created, to any other provision of chapter 120.

(6) The board may bring a complaint under s. 60.05 seeking temporary and permanent injunctive relief against any nuisance described in subsection (1).

(7) This section does not restrict the right of any person to proceed under s. 60.05 against any public nuisance.

(8) As used in this section, the term "controlled substance" includes any substance sold in lieu of a controlled substance in violation of s. 817.563 or any imitation controlled substance defined in s. 817.564.

Historical and Statutory Notes

Derivation:

Laws 1994, c. 94-242, § 1.
Laws 1993, c. 93-227, § 6.
Laws 1991, c. 91-143, § 1.
Laws 1990, c. 90-207, § 2.
Laws 1987, c. 87-243, § 7.

Laws 1990, c. 90-207, § 2, eff. July 1, 1990, in the section heading and in subsec. (1), included provisions relating to youth and street gang activity.

Laws 1991, c. 91-143, § 1, eff. Oct. 1, 1991, substituted "that has" for "which have" and inserted ", within a 6-month period" and "or as the site of violation of s. 796.07," in subsec. (1), inserted new subsec. (5), redesignated former subsecs. (5) and (6) as subsecs. (6) and (7), and substituted in subsec. (6) "temporary and permanent injunctive relief" for "a permanent injunction " .

Laws 1993, c. 93-27, § 6, eff. Oct. 1, 1993, reenacted subsec. (1) for the purpose of incorporating the amendment to 796.07 in a reference thereto.

Laws 1994, c. 94-242, § 1, eff. Oct. 1, 1994, substantially rewrote subsecs. (1) and (3), and added subsec. (8). Prior to amendment subsecs. (1) and (3) provided:

"(1) Any place or premises that has been used on more than two occasions, within a 6-month period, as the site of the unlawful sale or delivery of controlled substances or as the site of a violation of s. 796.07, or any place or building used by a youth and street gang for the purpose of conducting a pattern of youth and street gang activity may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section."

"(3) If the board declares a place or premises to be a public nuisance, it may enter an order immediately prohibiting:

"(a) The maintaining of the nuisance;

"(b) The operating or maintaining of the place or premises: or

"(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance."

APPENDIX E

ST. PETERSBURG CITY CODE

ARTICLE II. DRUG RELATED NUISANCES

DIVISION 1. GENERALLY

Secs. 19-51—19-65. Reserved.

DIVISION 2. NUISANCE ABATEMENT BOARD*

Sec. 19-66. Creation; composition; term of office.

(a) There is hereby created and established a board to be known and designated as the "Nuisance Abatement Board."

(b) Such Board shall consist of seven members, and two alternates, who are residents of the City of St. Petersburg, serving without pay, appointed by the Mayor and confirmed by City Council.

(c) The terms of members of the Board, except for the terms of the initial members, shall be for three years. Initial appointment to this Board shall be staggered with three members appointed for terms of three years, two members appointed for terms of two years, and two members appointed for terms of one year. The terms of the initial alternates shall be staggered, with one alternate appointed for a one-year term and one alternate appointed for a two-year term. The terms of alternates, except for the initial alternates, shall be two years. Any vacancy shall be filled for the remainder of the unexpired term.

(Ord. No. 1137-F, §1, 11-2-89; Ord. No. 1149-F, § 1, 12-21-89; Ord. No. 10G, §1, 7-6-93; Ord. No. 128-G, § 3, 4-7-94)

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*Cross reference—Boards, commissions, etc., § 2-296 et seq.

State law reference—Drug abuse nuisance abatement boards, F.S. § 893.138.1947

Sec. 19-67. Powers and duties.

(a) The Nuisance Abatement Board shall have the power to adopt rules for the administration and conduct of its hearings. Such rules shall not be inconsistent with this article and the rules of procedure adopted by the City Council. Such rules shall be designed to facilitate the efficient administration of this article and shall always ensure fundamental due process.

(b) The Board shall have the power to subpoena alleged violators and witnesses to its hearings. Such subpoenas may be served by the City's Police Department, or by such other persons as the Board may appoint.

(c) The Board shall have the power to subpoena evidence, records and other material relevant to the proceedings.

(d) The Nuisance Abatement Board shall hear complaints alleging that any place or premises constitutes a public nuisance, and may find said place or premises, or any part thereof, to be a public nuisance, upon clear and convincing, and competent evidence that said place or premises has been used on one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion, all within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance; or, has been used on more than two occasions, all within a 6-month period:

(1) As the site of a violation of § 796.07, Florida Statutes;

(2) As the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(3) By a youth and street gang for the purpose of conducting a pattern of youth and street gang activity;

For the purpose of this article "place or premises" means the land and its appurtenances and structures thereon as such land is described or contained in the deed or instrument of conveyance as same is recorded in the Public Records of Pinellas County, Florida.

For the purpose of this article "controlled substance" includes any substance sold in lieu of a controlled substance in violation of § 817.563, Florida Statutes, or any imitation controlled substance defined in § 817.564, Florida Statutes.

(e) Any employee, officer or resident of the City may file a complaint with the Board.

(1) Such complaint shall be reviewed by the City Attorney or a regular or special Assistant City Attorney for legal sufficiency.

(2) If the reviewing attorney has reason to believe a public nuisance exists on the premises, a formal notice of hearing shall be filed.

(3) The Board, through its Recording Secretary, shall schedule a hearing and send a copy of the complaint and the notice of hearing by certified mail, return receipt requested, or hand delivered, to the owner of the place or premises complained of at the last known address of such owner, postmarked at least ten business days prior to the scheduled hearing.

If an attempt to reach the owner and/or operator by hand delivery or certified mail is unsuccessful, notice of the hearing may be made by publication as provided in F.S. ch. 49. Notice must effectively provide the owner of the place or premise three days' notice.

(4) The notice of hearing shall include:

a. A statement of the time, place and nature of the hearing.

b. A statement of the legal authority and jurisdiction under which the hearing is to be held.

c. A reference to the particular sections of the statutes and ordinances involved.

d. Copy of the complaint.

(f) The Board shall conduct a public hearing on the complaint, receiving evidence pertaining to the alleged unlawful sale or delivery of controlled substances, the

alleged pattern of youth and street gang activities, or the alleged violation of F.S. § 796.07 at the site. The Board may also consider evidence of the general reputation of the place or premises.

(g) The owner of the place or premises shall have the opportunity to appear before the Board, in person and/or through legal counsel, to offer evidence in defense of such owner.

(h) All testimony shall be under oath and shall be recorded. The Board shall not be bound by formal rules of evidence; however, it shall act to ensure fundamental due process in its hearing process.

(i) At the conclusion of the hearing, and based solely on the evidence received, the Board may find by a majority of the Board present and voting that the place or premises has been used as alleged in the complaint and that such place or premises thereby constitutes a public nuisance.

(j) If the Board does not find that the allegations of the complaint have been proved, it shall dismiss the complaint.

(k) If the Board finds the existence of a public nuisance, the Board may enter an oral order requiring the owner of such place or premises to adopt such procedure as may be appropriate under the circumstances to abate any such nuisance or it may enter an oral order immediately prohibiting:

(1) The maintaining of the nuisance;

(2) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(3) The conduct, operation or maintenance of any business or activity on the premises which is conducive to such nuisance.

Such order shall expire after one year or at such earlier time as is stated in the order.

(l) Such order shall be approved by a majority of the Board present and voting, contain findings of fact and conclusions of law and state the affirmative relief granted by the Board. Such order shall be reduced to writing and mailed or hand delivered to the respondent within ten working days after the hearing.

(Ord. No. 1137-F, § 2, 11-2-89; Ord. No. 1149-F, § 2, 12-21-89; Ord. No. 2137-F, §§1—3, 1-9-92; Ord. No.203-G,§ 1, 8-10-95)

Sec. 19-68. Enforcement of orders.

(a) Any order issued by the Nuisance Abate ment Board shall expire after one year or at such earlier time as is stated in the order.

(b) The Board may bring a complaint under F.S. § 60.05 seeking a permanent injunction against any nuisance. The City Attorney or a regular or special Assistant City Attorney shall prosecute such action on behalf of the Board.

(Ord. No. 1137-F, § 3, 11-2-89)

Sec. 19-69. Appeals.

An aggrieved party, including the City, may appeal a final administrative order of the Nuisance Abatement Board to the Circuit Court of the Sixth Judicial Circuit. Such an appeal shall not be a hearing de novo, but shall be limited to appellate review of the record created before the Board. An appeal shall be filed within 30 days of the date of the written order appealed from.

(Ord. No. 1137-F, § 4, 11-2-89)

Sec. 19-70. Attendance, quorum.

(a) A member must be present for 75 percent of the meetings or the Chair shall declare the member's office vacant. A member must be present for 75 percent of the meeting to be considered present. A vacancy on the Board shall be filled by appointment by the City Council for the unexpired term of such former member.

(b) Any member who fails to attend two of three successive meetings without cause and prior approval of the Chair shall automatically forfeit the appointment and create a vacancy on the Board to be filled by the City Council for the unexpired term of such former member.

(c) A quorum of the Board shall consist of four or more members, and an affirmative vote of a majority of those present and voting shall be necessary to pass any motion or adopt any order.

(Ord. No. 1137-F, § 5, 11-2-89)

Sec. 19-71. Procedure.

(a) The rules of procedure attached to Ord. No. 1137-F are adopted as the procedures to govern the operation of the Board, until modified as provided therein.

(b) The rules of procedure may be altered by the City Council by resolution in a manner not inconsistent with the Florida Statutes and City ordinances. A City Council resolution adopted pursuant to this division shall not modify the rules except in a manner consistent with this division and the governing law and shall not expand the powers of the Board or deal with a subject not expressed in the rules.

(c) The Florida Rules of Civil Procedure may be used as a guideline to aid the Board in determining what procedures to follow in circumstances not covered by the Board's rules. However, the Board is not bound by such rules of civil procedure.

(d) All meetings, regular or special, and all hearings shall be open to the public in accordance with the provisions of the Florida "Sunshine Law" (F.S. ch. 286).

(e) All records of the Board shall be open to public examination, inspection and copying in accordance with the provisions of the Florida "Public Records Law" (F.S. ch. 119).

(Ord. No. 1137-F, § 6, 11-2-89)

Sec. 19-7- 19-100. Reserved.

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APPENDIX F

IN THE CIRCUIT COURT for
PINELLAS COUNTY, FLORIDA
Civil Division

WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement, dated March 28, 1991,
Plaintiff,

v. Case No. 93-0028S9-CI-11

CITY OF ST. PETERSBURG,
Defendant.

DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT

The defendant, CITY OF ST. PETERSBURG, through counsel, pursuant to Fla.R.Civ.P. 1.510(b) moves this Honorable Court for rendition of a final summary judgment in its favor as to the Complaint filed herein and in support of this Motion states that there are no genuine issues of material fact and the defendant City is entitled to a judgment as a matter of law.

The material undisputed facts in this case are:

1. Plaintiff WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement dated March 28, 1991, was the fee simple owner of the real property which is the subject of this suit, to wit: the Lorraine Apartments, a 15-unit apartment building located in St. Petersburg, Florida.

2. The City of St. Petersburg's Nuisance Abatement Board ordered the Lorraine Apartments closed for one year, effective August 16, 1993. (A copy of the NAB's order is attached hereto and is incorporated herein by reference as **Exhibit "A"**)

3. Plaintiff suffered some measure of damages as a result of the subject closure; i.e. the fair market value immediately before August 16, 1993 was $145,000 and the fair market value immediately following closure was $82,000. (See Plaintiff's answers to Interrogatory 12 & 13 , attached as **Exhibit "B")**[1]

4. The Plaintiff received no compensation from the City for the damages aforementioned.

5. All lawful conditions precedent to the filing of this law suit have been met by the Plaintiff.

The substantial matters of law to be argued at the hearing of this Motion are:

6. The 1-year closure does not constitute a taking for public use within the context of the Fifth Amendment injunction *"...nor shall private property be taken for public use, without just compensation."* Hence, Plaintiff states no cause of action for a compensable taking.

7. No Fifth Amendment 'taking' occurred because the 1-year closure was within the "nuisance exception" to the taking guarantee. Similarly, the one year closure was premised upon Fla. Stat. 893.138 and therefore falls within the "police powers exception" even though the property's value was affected.

8. The 1-year closure was not the equivalent of a physical appropriation because the property retained substantial value immediately following the taking. Hence, no compensation is required by either the federal or Florida constitutions.

[1] The diminution of value alleged by plaintiff is admitted for purposes of this motion only, as discovery on 'damages' issues continues.

APPENDIX G

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA CIRCUIT CIVIL CASE NUMBER 93-002859-CI-011

WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement, dated March 28, 1991,
Plaintiff,

vs.

THE CITY OF ST. PETERSBURG,
Defendant.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiff, WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement dated March 28, 1991, by and through his undersigned counsel, pursuant to Florida Rules of Civil Procedure 1.510(b), moves this Honorable Court for the entry of Partial Summary Judgment in his favor as to the Complaint filed herein on the issue of liability and in support of this motion states that there are no genuine issues of material fact and the Plaintiff is entitled to a Partial Summary Judgment as a matter of law on the issue of liability.

MATERIAL UNDISPUTED FACTS

The material undisputed facts in this case are:

1. Plaintiff, William A. Bowen, as trustee of the William A. Bowen Trust Agreement dated March 28, 1991, was the fee simple owner of the real property which is the subject of this suit, to wit: the Lorraine Apartments, a 15 unit apartment building located in St. Petersburg, Florida.

2. The City of St. Petersburg's Nuisance Abatement Board ordered the Lorraine Apartments closed for one year effective August 16, 1993.

3. The Nuisance Abatement Order entered on July 20, 1993 deprived the Plaintiff, as property owner, of all economic use of the property as there was no other economic use the apartments could be put to during the one year close down period.

MATTERS OF LAW TO BE ARGUED

The substantial matters of law to be argued are as follows:

1. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation. As the regulation and Order of the Nuisance Abatement Board denies the land owner of all economic use of the land, a taking has occurred for which the property owner must be compensated.

/S/
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ORIGINAL FILED
DEC 27 1996

No. 96-850

In the Supreme Court of the United States
October Term, 1996

City of St. Petersburg, Florida
Petitioner,

v.

William A. Bowen, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida
Second District

Motion for Leave to File and Brief for Amici Curiae Florida League of Cities, Inc., et al. in Support of Petitioner City of St. Petersburg, Florida

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In the Supreme Court of the United States
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City of St. Petersburg, Florida
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v.

William A. Bowen, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

MOTION FOR LEAVE TO FILE
A BRIEF *AMICI CURIAE*

The Florida League of Cities, Inc., *et al.,* hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Florida League of Cities, *et al.,* in this case arises from the substantial impact *City of St. Petersburg v. Bowen*, 675 So. 2d 626 (Fla. 2d DCA 1996), *rev. denied,* (680 So. 2d 421 Fla. 1996), *petition for cert. filed*, (U.S. Case No. 96-850) has had or potentially could have on the inherent power of the cities and counties of this Nation to abate nuisances.

In *City of St. Petersburg v. Bowen*, the Florida Second District Court of Appeal upheld the holding of the trial court by applying the Fifth Amendment to United States Constitution to a quasi-judicial order of the nuisance

abatement board of the City of St. Petersburg, relying substantially on *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003 (1992) without recognizing *Bennis v. Michigan*, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996). Since it is likely that respondent may pursue the same course in this Court, it is believed that the brief which *amici curiae* is requesting to file will illustrate more completely the constitutional issue before this Court. It is also suggested that the brief by *amici curiae* will provide this Court with extensive information about the substantial impact the case has had and potentially could have on the abatement of nuisances by cities and counties of this Nation.

Respectfully submitted,

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No. 96-850

In the Supreme Court of the United States
October Term, 1996

City of St. Petersburg, Florida
Petitioner,

v.

William A. Bowen, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER CITY OF ST. PETERSBURG, FLORIDA

INTEREST OF AMICI CURIAE

The Florida League of Cities, Inc., is a Florida corporation not-for-profit, composed of more than 397 municipalities and five charter counties in the State of Florida. As provided in the League's charter, the principal purposes of the League are the general improvement of municipal government, its efficient administration, and the promotion of the welfare of the citizens in municipalities throughout the State of Florida.

The Florida Association of Counties, Inc., is a not-for-profit corporation organized specifically to protect, promote, and improve the mutual interests of al counties within the State of Florida. Presently, the Association

represents all 67 county governments, both charter and non-charter. The Association believes the issues in this matter to be of great public concern as they affect every county government within the State and further believes its participation will assist the Court in resolving the issues presented.

The City of Fort Lauderdale, Florida is a municipal corporation of the State of Florida. The City of Fort Lauderdale is substantially interested in and would substantially affected by the holding in this case.

Broward County, Florida, a political subdivision of the State of Florida, is a local government charged with the responsibility of providing for the welfare of its citizens. This case will impact on Broward County's determinations regarding this matter.

The International Municipal Lawyers Association is a non-profit, nonpartisan organization, consisting of over 1,400 local governments and their attorneys. Member governments operate IMLA through their chief legal officers, variously called city of county attorneys, corporation counsel, city solicitors, law directors, and other titles. IMLA is dedicated to gathering and disseminating information on recent legal developments that affect municipalities. IMLA participates in a case in an *amicus* capacity when a majority of the Board of Director determine that the case has nationwide impact and *amicus* support is warranted.

The Arkansas Municipal League is a non-profit association of over 480 Arkansas municipalities. Over 2,500 mayors, aldermen, city managers, city board members, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The Arkansas Municipal League Legal Defense Program has a one of its functions the monitoring of major litigation which affects

municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

The Illinois Municipal League is a non-profit, non-political association of 1,068 Illinois cities, villages, and incorporated towns, recognized by statute as the instrumentality of its members. The Illinois Municipal League has an interest in the outcome of this case as it could seriously threaten the public health, safety, and welfare of its member municipalities.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort and whose membership is comprised of some 510 Michigan cities and villages. Among its members are 383 city and village members of the Michigan Municipal League Legal Defense Fund which the Michigan Municipal League operates through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The New York State Conference of Mayors and Municipal Officials (NYCOM) is a voluntary membership association for the cities and villages of the State of New York, which provides assistance and advice to its members. NYCOM's current membership consists of 61 of the State's 62 cities and 496 of its 558 villages, thereby representing the great majority of such municipalities. NYCOM advocates and supports legislation, participates in litigation and provides information and education beneficial to the administration of municipal affairs. NYCOM has a vital interest in the outcome of this case as it could negatively affect the majority of our members and the quality of life of their citizens.

The City of Bakersfield, California, is a charter law city, and the City is substantially interested in and would be substantially affected by the holding in this case.

The City of Concord is a General Law City of the State of California, and the City is substantially interested in and would be substantially affected by the holding in this case.

The City of Fullerton is a municipal corporation of the State of California, and is substantially interested in and would be substantially affected by the holding in this case.

The City of Lafayette is a municipal corporation of the State of California, and is substantially interested in and would be substantially affected by the holding in this case.

The City of Monterey is a Charter City of the State of California, and the City is substantially interested in and would substantially affected by the holding in this case.

The City of Montclair is a municipal corporation of the State of California, and the City is substantially interested in and would be substantially affected by the holding in this case.

The City of Piedmont is a Charter City of California, and the City realizes the significance of the St. Petersburg case to and to all cities throughout the United States.

The City of Sacramento, California, is a Charter City duly organized under the laws of the State of California, and the City of Sacramento, California, is substantially interested in and would be substantially affected by the holding in this case.

The City of San Pablo is a municipal corporation of the State of California, and the City is substantially interested in and would be substantially affected by the holding in this case.

The City of Waterford is a municipal corporation of the State of California, and the City is substantially interested

in and would substantially affected by the holding in this case.

The Florida Police Chiefs Association is a non-profit Florida Corporation representing over 300 law enforcement agencies in Florida. Member agencies are charged with public safety and law enforcement duties in Florida and have a direct interest in preserving the ability of local governments to abate illegal public nuisances.

The Dade County Association of Chiefs of Police is a non-profit corporation representing local, state and federal law enforcement agencies, including 29 municipal police departments, in Dade County, Florida, the most populous county in the State of Florida. Member agencies are charged with public safety and law enforcement duties and have a direct interest in preserving the ability of local governments to abate illegal public nuisances.

The Florida Sheriffs Association is a non-profit Florida Corporation representing 67 sheriffs' offices in the State of Florida. Member agencies are charged with public safety and law enforcement duties in Florida and have a direct interest in preserving the ability of local governments to abate illegal public nuisances.

At issue in this case is the application of the Just Compensation Clause to an order of the nuisance abatement board of the City of St. Petersburg, Florida. The nuisance abatement board of the City of St. Petersburg, Florida (hereinafter City) held after a quasi-judicial proceeding that an apartment house owned by Mr. Bowen was a public nuisance. The finding supporting the holding was based on competent substantial evidence that unlawful sale of a controlled substance occurred on the premises. The nuisance abatement board of the City ordered the building closed for a period of one year. Mr. Bowen subsequently sued the City

in inverse condemnation, claiming that the order of the nuisance abatement board resulted in the loss of all economically viable use of his property. The nuisance abatement board order was issued pursuant to Section 893.138, Florida Statutes, and the corollary ordinances of the City of St. Petersburg. *City of St. Petersburg v. Bowen*, 675 So. 2d 626, 627 (Fla. 2d DCA 1996), *rev. denied*, 680 So. 2d 421 (Fla. 1996), *petition for cert. filed,* Case No. 96-850. The District Court of Appeal in adopting the trial court's order found a compensable taking had occurred based in large part on the *Lucas v. South Carolina* case.

The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused. *Amici Curiae* respectfully submit this brief in support of the Petitioner, the City of St. Petersburg, Florida.

REASONS FOR GRANTING THE WRIT

A. The Application of the Guarantee Clause of the Fifth Amendment to the United States Constitution to an Inverse Condemnation Action Arising from a Nuisance Abatement Proceeding Raises a Federal Question of Vital Importance to Cities and Counties.

The abatement of public nuisances has long been a basic authority of cities and counties when exercising the police power to protect the health, safety and welfare of the citizenry. In *City of St. Petersburg v. Bowen*, 675 So. 2d 626 (Fla. 2d DCA 1996), *rev. denied*, 680 So. 2d 421 (Fla. 1996), *petition for cert. filed,* Case No. 96-850. The Florida Second District Court of Appeal severely altered nuisance abatement law in Florida. The *Bowen* court's ruling has questioned the

essential authority of cities and counties in Florida as well as nationwide to abate nuisances without compensation. Rather than applying well established nuisance law, *See Bennis v. Michigan*, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996), the Florida Second District Court of Appeal erroneously relied and misapplied the land use case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886. 120 L. Ed. 2d 798 (1992).

The review of the *Bowen* case presented to you by the City of St. Petersburg offers this Court the opportunity to discuss and clarify what courts and commentators have referred to as the "Lucas nuisance exception," *compare Bowen*, 675 So. 2d at 631, *with* Scott R. Ferguson's *The Evolution of the 'Nuisance Exception' to the Just Compensation Clause: From Myth to Reality*, 45 Hastings L.J. 1539, 1553-1557 (1994), as well as the relationship between regulatory, property-based land use law and abatable, tort based nuisance principles.[1] In so doing, this Court will greatly assist the exercise of the police power by cities and counties of this Nation. In land use law, it is well established that abusive regulation can result in monetary compensation. On the other hand, by its very nature, the application of nuisance abatement or forfeiture law is rarely compensable.

The *Lucas* case teaches us that certain nuisances remain exempt from the requirement for compensation even under an inverse condemnation claim, while the *Bowen* court's construction of and reliance on *Lucas* creates considerable uncertainty, confusion and liability for local

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[1] The law underlying the harm from which Mr. Bowen seeks relief relates solely to nuisance abatement and not to property regulation as he alleged in this case. *Cf. Lucas* at 120 L. Ed. 2d 798, 817, n.14.

government. The application of the Just Compensation Clause of the Fifth Amendment to the abatement of common law nuisances chills the local government's ability to ensure that the public health safety and welfare are secure.[2] It affects not just the abatement of the sale of controlled substances as in *Bowen* but that of any public nuisance.

The application of the Just Compensation Clause of the Fifth Amendment to a city or county nuisance abatement proceeding is a matter of first impression before this esteemed Court.

The majority in *Lucas* refined the long-standing nuisance exception for inverse condemnation jurisprudence to the application of those regulations which create a loss of all economically beneficial use of real property and regulations which restrict a use which was part of the landowner's title to begin with. *Lucas*, 120 L. Ed. 2d at 820. *Lucas* does, however, recognize that compensation is not required for the application of those regulations which eliminate the land's only economically productive use if the use of the property was always unlawful. *Id.* at 821. It is true that the majority in *Lucas* mentions common law actions for nuisance as a showing the government may make to avoid compensation for the application of a regulation. *Id.* at 822-23. However, a close reading of the opinion clearly indicates that the statement about the common law does not

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[2] For example, the cities of Bradenton, Branford, Boynton Beach, Fernandina Beach, Kissimmee, Lake Worth, Miami, Ormond Beach, Sanford, St. Pete Beach, and West Palm Beach, Florida, at a minimum, have either suspended or chosen not enforce their nuisance abatement procedures on advice of counsel. Supporting information is held in Florida League of Cities headquarters files, 201 West Park Avenue, Tallahassee, Florida 32302.

insinuate that the only nuisances which are not compensable are those that existed in the common and statutory law of England in 1776, nuisances as has been suggested by the *Bowen* court.[3] Instead, by the statement the *Lucas* majority was insuring that the nuisance in question must be defined by the state and that the nuisance exist at the time the property owner was seized of the title to the property at issue. However, obvious confusion exists about the compensation for nuisances whether they stem from the application of a land use regulation as in *Lucas* or from the enforcement of an order of a quasi-judicial board established under state and local law as in *Bowen*.

In *Bowen*, the City of St. Petersburg sought to abate the illegal sale and possession of controlled substances. The illegal sale and possession of controlled substances has long

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[3] Specifically, the *Lucas* majority refers to the non-compensable state action of requiring the removal of a nuclear generating plant from land which sits astride an earthquake fault. *Lucas* at 821. It is doubtful the nuclear generating plants were operating in Blackstone's time. It seems reasonable that the *Lucas* majority was sanctioning nuisances such as those addressed in the *Muglar v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887) line of cases.

The common law in force in Florida is defined as the following:

> The common law and statute law of England which are of general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this date; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Fla. Stat. § 2.01 (1995). Thus, the English common law is subsumed by Florida's statutory law. As one commentator noted after reviewing the *Restatement (Second) of Torts*, "This accords with the belief that once a statute has been passed, it passes into the common law." Robert H. Freilich & Elizabeth A. Garvin, *Takings after Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 432 (1993).

been deemed a nuisance by the State of Florida. The permissible remedy for such a nuisance may be a forfeiture of the building, *United States v. Ursery*, 518 U.S. ___, 135 L. Ed. 2d 549 (1996), closure of the premises, or an injunction against the activity depending on the circumstances. *See, generally Orlando Sports Stadium, Inc. v. State*, 262 So. 2d 881 (Fla. 1972). Specifically, it was under the procedure outlined in Section 893.138, Florida Statutes (1993), and corresponding ordinances of the City, that the order of abatement issued in the instant case.

Even under *Lucas*, the use of Mr. Bowen's property would be deemed a nuisance. First, contrary to the finding of the trial court in *Bowen*, the enforcement order arguably did not deprive Mr. Bowen of all economically viable use of his property. He was merely prohibited from leasing the apartments in the subject building for a period of one year. During the one year period, the other permissible uses in the zoning classification for Mr. Bowen's property[4] were legally available to him. Secondly, the nuisance existed at the time the Mr. Bowen received title to the property at issue. Mr. Bowen acquired the property in 1991. *Bowen*, 675 So. 2d at 627. The nuisance provision for which Mr. Bowen was sanctioned was in existence in 1991. *See* Fla. Stat. Section 893.138 (1991). Mr. Bowen had no property right to allow the sale of illegal drugs on his premises. Thus, he had no property right which the City could abridge by their action. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Cir. 1994); 38 Fla. Jur. 2d *Nuisances* §§ 1 and 36 (1982).

This case affects not only the abatement of the nuisance at issue here, but potentially the abatement of

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[4] *See* St. Petersburg City Code, Division 30, Sections 29-856 through 29-859, attached as Appendix A.

nuisances throughout the nation[5]. Clearly, this case is one of importance to the cities and counties of the State of Florida, as well as all cities and counties in the nation.

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[5] For example, the uses declared a nuisance in Florida include at a minimum the following: Fla. Stat. § 125.01 (1995) (powers to abate nuisances related to zoning and housing community redevelopment); Fla. Stat. § 125.563 (1995) (abatement of nuisances of dumping sewage, chemicals, explosives, refuse, dredging, causing water pollution and inland shore erosion); Fla. Stat. §§ 161.052, 161.053 (1995) (nuisance abatement related to beach and shore preservation, by regulation of coastal construction); Fla. Stat. § 316.077 (1995) (display of unauthorized signs, signals or markings deemed nuisance); Fla. Stat. § 327.53 (1995) (relating to marine vessel safety, vessel sewage deemed a nuisance); Fla. Stat. § 333.02(1)(a) (1995) (abatement of nuisances relating to airport land hazards and incompatible use of vicinity lands); Fla. Stat. § 335.092 (1995) (abatement of nuisances created by advertisements along Everglades Parkway); Fla. Stat. § 339.241 (1995) (abatement of nuisances relating to Florida's Junkyard Control Law); Fla. Stat. §§ 370.061; 370.1103; 370.15; 370.16 (1995) (abatement of nuisances relating to illegal actions under Saltwater Fisheries); Fla. Stat. § 372.31 (1995) (abatement of nuisances relating to illegal fishing devices); Fla. Stat. §§ 372.6672; 372.98; 372.993; 372.995 (1995) (abatement of nuisances relating to wildlife and recreational fishing); Fla. Stat. § 373.433 (1995) (abatement of nuisances related to stormwater management systems); Fla. Stat. § 381.0067 (1995) (non-compliance with Florida Safe Drinking Water Act deemed nuisance); Fla. Stat. §§ 386.01, 386.02, 386.03, 386.041, 386.051 (1995) (nuisances relating to public health and sanitation deemed abateable); Fla. Stat. §§ 403.021, 403.191, 403.413 (1995) (nuisances related to pollution control); Fla. Stat. § 479.105 (abatement of nuisances created by illegally erected signs in public right-of-way); Fla. Stat. § 499.06 (1995) (abatement of nuisance items as described in Florida Drug and Cosmetic Act); Fla. Stat. § 500.172 (1995) (abatement of nuisances as described in Florida Food Safety Act); Fla. Stat. § 509.142 (1995) (abatement of nuisance relating to conduct in lodging and food establishments); Fla. Stat. § 513.118 (1995) (abatement of nuisance relating to conduct in mobile home and recreational vehicle parks); Fla. Stat. § 514.06 (1995) (abatement of nuisance relating to public swimming and bathing facilities); Fla. Stat. § 550.255 (1995) (public nuisance created by unauthorized pari-mutuel wagering); Fla. Stat. § 561.29 (1995) (abatement of nuisance relating to property with beverage license); Fla. Stat. §§ 581.091, 581.111 (1995)

The reasonableness of the remedy is not at issue here, instead it is the lawfulness. Does this case negate the nuisance exemption from takings jurisdiction and subject every city or county to monetary payment for spoils of a crime? Does this mean that cities and counties may no longer seek to quell unlawful activity within their boundaries? Does this mean the cities and counties must raise taxes or cut the funding of some essential service, such as police, fire protection and the health of the public, to fund each illegal activity it seeks to impale? Does this mean that government must pay to protect its citizens?

(abatement of nuisances related to plant industry); Fla. Stat. § 585.15 (1995) (public nuisance created by dangerous transmissible disease or pest as related to animal disease inspection, control and eradication); Fla. Stat. § 593.116 (1995) (abatement of nuisance plants related to Boll Weevil Law); Fla. Stat. § 823.01 (1995) (criminal penalty provided for specific public nuisances); Fla. Stat. § 823.02 (1995) (public nuisance relating to building bonfires); Fla. Stat. § 823.04 (1995) (public nuisance relating to importation of diseases or pest-ridden animals); Fla. Stat. § 823.041 (1995) (public nuisance relating to disposal of bodies of dead animals); Fla. Stat. § 823.05 (1995) (certain places of prostitution, assignation, lewdness, games of chance, or in which laws are violated found to be a public nuisance); Fla. Stat. § 823.13 (1995) (places where obscene materials are illegally kept, sold, or used, drive-in theaters, films visible from public streets or places declared public nuisances); Fla. Stat. § 823.15 (1995) (uninvited or stray dogs and cats declared a public nuisance); Fla. Stat. § 849.20 (1995) (structures which house illegal gambling machines and devices declared a nuisance); Fla. Stat. § 893.138 (1995) (structure in which drug-related or prostitution, or youth and street activity occurs declared a public nuisance).

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request the Court to grant the Petition for Writ of Certiorari by the City of St. Petersburg, Florida.

Respectfully submitted,

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APPENDIX A

St. Petersburg City Code

DIVISION 30. CBD-2 CENTRAL BUSINESS DISTRICT

Sec. 29-856. Purpose and intent.

(a) The intent of the CBD-2 Central Business District is to provide a residential support zone for the intense commercial in the CBD-Core and CBD-1 areas. Residential, hotels, motels and office uses are permitted and high density is possible through the use of a bonus system. Low intensity retail and service establishments are permitted for the use of residents and employees of allowable principal uses, not to exceed 20 percent of gross building area.

(b) Development in this district should provide appropriate pedestrian amenities, pedestrian linkages to required open spaces, and ground level retail and cultural activities. Buildings and open spaces and other accessory items (e.g., seating, lighting, and landscaping) should be designed in an appropriate manner which promotes a successful people-oriented downtown area as exemplified in the Intown Redevelopment Plan.

(c) Developments in this zoning district which are also located within a designated community redevelopment area as such area is defined in F.S. ch. 163, shall be reviewed by the Community Redevelopment Agency (see section 29-49) for compliance with adopted redevelopment plans. (Code 1973, § 64.304)

Sec. 29-857. Permitted principal uses and structures.

Subject to the provisions or restrictions contained in this section and elsewhere in this chapter, permitted principal uses and structures in the CBD-2 Central Business District are as follows. Site plans for permitted uses and structures with up to 150,000 square feet gross floor area inclusive require approval by the City Manager. Uses and structures with more than 150,000 square feet gross floor area will require site plan approval by the Environmental Development Commission.

(1) Parks and related uses.

(2) Churches.

(3) Residential uses.

(4) Community residential homes for one to 14 residents, subject to conditions set forth in section 29-219(a) and section 29-219(b).

(5) Motels and hotels.

(6) Parking lots, provided:

a. A five-foot decorative masonry wall as a barrier to noise, glare, fumes and dust, shall be erected along the side lot lines of parking lots.

b. No source of illumination for such lot shall be directly visible from any window in any

residence or from any window in any room used for sleeping purposes.

c. There shall be no sales or service activities on such lots, nor parking of house trailers of any kind, nor trucks, except for operative automobiles and appurtenances, and light commercial vehicles, for more than 24 hours.

(7) Offices in conjunction with residential use and with not more than 50 percent of the gross floor area.

(8) Studios.

(9) Financial institutions with or without drive-through facilities.

(10) Mixed uses of a permitted or permissible use involving a residential use.

(11) Service, retail establishments, office service and indoor eating and drinking establishments fronting along Ninth or Fourth Street or as accessory use to a residential project, and not exceeding 20,000 square feet per block bounded by public streets. (See section 29-868.)

(12) Business and professional schools.

(13) Day care centers.

(14) Bed and breakfast homes. (See section 29-222.)

(Code 1973, § 64.305; Ord. No. 135-G, § 41, 4-7-94; Ord. No. 184-G, § 3, 12-15-94)

Sec. 29-858. Permitted accessory uses and structures.

The following accessory uses and structures are permitted in the CBD-2 Central Business District:

(1) Uses and structures which:

a. Are customarily accessory and clearly incidental and subordinate to permitted or permissible uses and structures.

b. Are not of a nature prohibited under section 29-860.

(2) Temporary structures and operations in connection with an on the site, building or land preparation developments, including dredging and filling, grading, paving, installation of utilities, construction, erection of field office, and structures for storage of equipment and building materials, provided a certificate of occupancy shall have been issued therefor.

(3) One on premises dwelling unit for occupancy by the owner, lessor, manager, watchman or custodian in connection with the operation of any permitted or permissible use.

(Code 1973, § 64.306)

Sec. 29-859. Permitted special exceptions.

After public notice and hearing, and subject to appropriate conditions and safeguards, the Environmental Development

Commission may permit the following special exceptions in the CBD-2 Central Business District:

(1) Academic Schools, colleges and universities.

(2) Community service and private clubs.

(3) Mortuaries.

(4) Utility substations.

(5) [*Reserved.*]

(6) Commercial recreation. (See section 29-868.)

(7) Parking garages for parking of automobiles only, and without sales facilities or service facilities other than required for parking automobiles, provided the building shall be fully enclosed.

(8) Hospitals.

(9) Communications facilities.

(10) Birthing centers. (See section 29-2, definitions.)

(11) Government and community buildings and uses.

(12) Community residential homes for more than 14 residents, subject to conditions set forth in section 29-219(e).

(13) Service and retail establishments, office service and indoor and outdoor eating and drinking

establishments over 20,000 square feet only within the intown redevelopment area and part of the unified retail core program defined in the Intown Redevelopment Plan.

(14) Boarding and rooming houses with more than 20 units.

(15) Temporary employment offices.

(16) Nursing homes.

(Code 1973, § 64.307; Ord. No. 1111-F, § 1, 7-6-89; Ord. No. 135-G, § 42, 4-7-94; Ord. No. 167-G, § 1, 8-4-94; Ord. No. 184-G, § 4, 12-15-94)

Supreme Court, U.S.
FILED
DEC 17 1996
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(3)

No. 96-850

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

City of St. Petersburg, Florida
Petitioner,

v.

WILLIAM A. BOWEN, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

On Petition for a Writ of Certiorari
to the District Court Of Appeal of Florida
Second District

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA

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STATUTES

Section 893.138, Florida Statutes (1995) 1

INTEREST OF AMICUS CURIAE

The nuisance abatement proceedings conducted by the City of St. Petersburg's Nuisance Abatement Board were authorized by state law. Section 893.138, Florida Statutes (1995), provides that "any place or premises" may be declared a public nuisance if found to be the site of, *inter alia*, the unlawful sale or delivery of any controlled substance "on more than two occasions, within a 6-month period." The statute authorizes the creation of county or municipal boards to abate such nuisances and expressly provides that a board may order the place or premises closed for up to one year. It also provides for written notice to the owner and an opportunity for the owner to present evidence in his defense. *Id.*

As the petition for certiorari shows, many other states have laws similar to Florida's. (Pet. p.9, nn. 2,3) Historically, such laws have permitted state and local governments to abate a variety of nuisances--ranging from criminal activity to inappropriate land uses--in a variety of ways. Today, they are one means by which local governments can combat drug dealing by denying a safe and convenient place for such transactions. As a result of the decision of the Court of Appeal, however, Florida has now lost that weapon.

The decision in this case is a glaring anomaly in Fifth Amendment jurisprudence that portends only further confusion about what is a "taking" in Florida, and likely other, states. This Court is respectfully asked to grant a writ of certiorari to the Second District Court of Appeal.

SUMMARY OF ARGUMENT

The ruling of the Second District Court of Appeal in this case effectively holds that the temporary closure of any premises known to be the site of illicit drug activity within the ambit of the statute constitutes a taking that, under the Constitution, entitles the owner of the premises to compensation. In so ruling, the Court

of Appeal mistakenly treated the issue simply as one of land use regulation and relied exclusively on land use regulation cases, counting for nothing the ongoing criminal transactions at the Lorraine Apartments.

Government power to combat the pervasive scourge of drug dealing should not be confused with the more circumscribed and distinct limits on the power to regulate land development. The criminal use of property differs significantly from proposed development uses that may be inconvenient or undesirable to the community, and so do the constitutional constraints. The power to abate nuisances carries with it the power to prohibit the use of property for a reasonable period of time to ensure that nuisance activities are effectively stopped. Where government orders that property be temporarily closed to better effectuate abatement of a nuisance, there is no unconstitutional taking of the property.

ARGUMENT

I. The Decision of the District Court of Appeal Conflicts with Decisions of this Court Construing the Takings Clause and Completely Fails to Recognize the Authority of Government to Take Action that Will Effectively Deter the Criminal Use of Property.

Respondent's theory, adopted by the Court of Appeal, was that the mere demonstration of a temporary suspension of his right to lease his apartment units was sufficient to establish a violation of the Fifth Amendment Takings Clause, irrespective of the use to which that property was being put. This theory is flatly inconsistent with even a common sense understanding of government's responsibility to abate public nuisances, and it is contrary to the decisions of this Court.

This Court's most recent decisions construing the Takings Clause may refine, but certainly do not abandon, its many rulings that a state may, without paying compensation, prohibit the use of

property for purposes that amount to a public nuisance. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022, 1027-1029 (1992). *Lucas* instructs that in the context of land use regulation no compensation is due where inquiry shows "that the proscribed use interests were not part of [the owner's] title to begin with." 505 U.S. at 1027. Local government can permissibly prohibit whatever the State could "under its complementary power to abate nuisances that affect the public generally...." *Id.* at 1029. With particular relevance to this case, *Lucas* went on to state that, in the context of prohibiting nuisance uses of land, "[s]uch regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles" *Id.* at 1029-1030.

The petition for certiorari clearly demonstrates that Florida law has historically considered the use of property for illicit activities such as prostitution, gambling or drug dealing to be a public nuisance subject to abatement. The respondent here had no expectation at any time that under Florida law his apartment building could be used for repeated illegal drug transactions.

Nevertheless, the Court of Appeal concluded that the nuisance abatement board could do no more than order cessation of drug transactions and not closure of the property, because the latter action deprived the owner of all economically productive use of the apartment building. Neither *Lucas* nor any other precedent of this Court commands that result. To the contrary, this Court has repeatedly recognized that compensation is not required for every exercise of power that may entail the loss or destruction of property. In some circumstances, government may order the outright destruction of property without payment of compensation.[1] In others, the prohibition of offensive uses would

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[1] *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of healthy cedar trees

undoubtedly mean that, at least temporarily, the property could be put to no productive use, but that temporary loss of productive use does not mandate compensation.[2] *Lucas* did not abolish the government's right to abate activities that are either criminal or otherwise so offensive as to warrant no constitutional protection. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1182-83 (Fed. Cir. 1994). There is no right to use property for such purposes and hence no right to compensation when such activities are abated.

In this case, as a result of repeated criminal drug transactions occurring at the Lorraine Apartments, the premises were closed for one year. The fact that government may order property closed for a period of time to better effectuate abatement of a nuisance does not constitute a taking. Courts agree that such action simply constitutes "an appropriate means of definitely and completely ending the nuisance." *State ex rel. Haas v. Club Recreation and Pleasure*, 41 Or. App. 557, 599 P.2d 1194 (Or. App. 1979) (quoting *People ex rel. Lemon v. Elmore*, 256 N.Y.489, 177 N. E. 14, 16 (1931)). *See also State v. Dizzy Duck*, 203 Mich. App. 250, 511 N.W. 2d 907, 912 (Mich. App. 1994) ("It is within the discretion of the circuit court to choose a remedy less drastic than padlocking the building...").

This Court, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), upheld against a First Amendment challenge the closure for a period of one year of the premises of an "adult" bookstore which had been declared a nuisance because of repeated illicit sexual activities occurring there. Reversing the New York Court

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to prevent spread of disease to apple orchards); *Slocum v. United States*, 515 F.2d 237 (5th Cir. 1975) (destruction of birds with communicable avian disease).

[2] *Mugler v. Kansas*, 123 U.S. 623 (1887) (closure of brewery); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (closure of livery stable); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (forbidding continued operation of existing sand and gravel mining operation even on the assumption that it "would confiscate the entire remaining utility of [the] properties").

of Appeals, the decision observed that "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707.[3] There was not the slightest hint that, upon the finding of a nuisance, the closure of the building for a one-year period even implicated the Takings Clause.

Just this past term the Court rejected a Fifth Amendment taking claim in which an innocent co-owner challenged the forfeiture of her interest in an automobile used in the commission of one act of prostitution. *Bennis v. Michigan*, ____U.S.____, 116 S.Ct. 994 (1996). The Court recognized that Michigan, by enacting the forfeiture law in question, had "sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets." 116 S.Ct. at 1001. The Court further observed that "[f]orfeiture of property prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'" *Id.* at 1000 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416

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[3]Section 2320 of the New York Public Health Law provided in relevant part that:

> 2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

Section 2329 provided further that:

> 1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as part of the judgment in the case, which order...shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year...."

Arcara v. Cloud Books, Inc., 478 U.S. at 699-700.

U.S. 663, 687 (1974)). In the absence of any showing that the innocent co-owner had been deprived of due process in the forfeiture proceeding, there could be no taking claim. *Id.* at 1001.

The *Calero-Toledo* case involved the forfeiture under Puerto Rican law of a leased yacht on which Puerto Rican authorities had discovered marijuana. The decision expressly rejected the taking claim of the assertedly innocent owner, noting that the Puerto Rican statutes "further[ed]...punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." 416 U.S. at 686.

Temporary closure is much less drastic than forfeiture of ownership. This Court's decisions do not begin to suggest that respondent would have a viable taking claim based upon a temporary closure under such laws as the Florida statute in question here or the New York law in question in *Arcaro*. The closure of property found to be used as a site for repeated criminal activity prevents further illicit use and provides a strong incentive to property owners to ensure that their buildings do not become havens for drug dealing, prostitution, gambling or other criminal behavior that is properly regarded, at the very least, as a public nuisance subject to abatement. In the absence here of any claim at all of a denial of due process, the owner simply cannot contend that temporary closure effects a taking under the Fifth Amendment.

CONCLUSION

This Court should grant a writ of certiorari to District Court of Appeal and review its decision on the merits.

Respectfully Submitted,

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No. 96-850

In The

Supreme Court of the United States

October Term, 1996

CITY OF ST. PETERSBURG, FLORIDA,

Petitioner,

vs.

WILLIAM A. BOWEN, as Trustee of the William A. Bowen Trust Agreement,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a municipal Nuisance Abatement Board order requiring complete closure of an apartment complex for one year, thereby depriving a property owner of all economic use of the property, requires compensation under the Florida and United States Constitutions.

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Article X, Section 6(a) of the Florida Constitution 1

Respondent, William A. Bowen, as Trustee of the William A. Bowen Trust Agreement, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Florida's Second District Court of Appeals decision in *City of St. Petersburg v. William A. Bowen*, 675 So. 2d 626 (Fla. 2d D.C.A. 1996).

As noted by the Florida appellate court, this petition presents the narrow issue of whether closure of an apartment complex for one year, which undisputedly deprives an innocent property owner of all economic use of his property, amounts to a compensable taking by a municipality under Article X, Section 6(a) of the Florida Constitution and the Fifth Amendment of the United States Constitution.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT OF APPEAL MERELY APPLIES WELL-ESTABLISHED FIFTH AMENDMENT "TAKINGS" JURISPRUDENCE.

The Florida district court in *Bowen* conscientiously follows the precedents of this Court to reach its correct decision. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992), regulations which deny a property owner of substantially all productive use of his land constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. When a total regulatory taking occurs, the government can resist compensation only if the proscribed use merely prevents a common-law nuisance or does not restrict any part of the owner's inherent fee simple title. *Id.* In this case, because Petitioner's absolute closure decree deprived Respondent of an inherent title right to use his

apartment complex and Petitioner's decree was not a restriction only to prevent common law nuisances, the *Bowen* court correctly applies *Lucas* to determine that a compensable taking occurred — even if the taking was only for a limited period.

Ignoring the Florida court's proper application of this Court's "takings" jurisprudence, Petitioner argues that *Bennis v. Michigan*, 116 S. Ct. 994 (1996), supports the proposition that property "used" for an illegal purpose becomes a public nuisance and therefore may be confiscated by the government without payment of just compensation. In *Bennis*, the State of Michigan seized an automobile owned jointly by petitioner and her husband after the husband was convicted of gross indecency for sexual activities with a prostitute in the car. *Id.* at 996. This Court found that the automobile "facilitated and was used in criminal activity" and was therefore subject to Michigan's forfeiture statute. *Id.* at 1001. Additionally, because Michigan did not provide an "innocent-owner" defense, petitioner's lack of knowledge and consent to her husband's activities was irrelevant. *Id.* at 1000-1001.

Petitioner's reliance on *Bennis*, however, is misplaced. *Bennis* is a forfeiture case. There is no evidence that the state instituted forfeiture proceedings against Respondent or his property. Moreover, the due process concerns attendant in forfeiture cases are not addressed by section 893.138, Fla. Stat. (1995) or the St. Petersburg City Ordinance 1137-F (Code Sections 16-96 through 19-71), relating to Petitioner's Nuisance Abatement Board.

Under forfeiture law, the state confiscates property as a penalty because of the property's connection with the perpetration of a criminal act. In *Bennis*, the dissent identified three categories of property subject to seizure: "pure contraband; proceeds of criminal activity; and tools of the criminal's trade." *Id.* at 1004. The third category, sometimes referred to as

"derivative contraband," presents significant analytical problems when the "instrumentality" bears no connection with the crime other than as a mere location for its occurrence. *Id.* at 1004-1006. In fact, as observed by Justice Scalia, a building in which an isolated drug sale occurs cannot properly be regarding as an "instrumentality" of the offense for purposes of forfeiture because of the tenuous relationship between the confiscated property and the crime. *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in the judgment). As noted by the dissent in *Bennis*:

> While our historical cases establish the propriety of seizing a freighter when its entire cargo consists of smuggled goods, none of them would justify the confiscation of an ocean liner just because one of its passengers sinned while on board.

Id. at 1005 (citations omitted).

Contrary to Petitioner's invitation, this case does not present an opportunity for the Court to "reaffirm and strengthen" any principle of *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987). In *Keystone*, this Court upheld the constitutionality of state legislation designed to protect Pennsylvania's environment from problems associated with coal mine subsistence. The petitioners in *Keystone* claimed the legislation amounted to an unlawful taking because it required coal mining operations to leave various quantities of coal unmined, as a means of preventing subsistence in other areas. *Id.* at 475-79. Rejecting petitioners' argument, this Court noted that petitioners "retained the right to mine virtually all of the coal in their mineral estates . . . ." and therefore held that the statute therefore did not amount to a taking. *Id.* at 501. In other words, the petitioners in *Keystone*, unlike Mr. Bowen, did

not lose all economic use of their property. The governmental action in *Keystone* neither made it impossible for the claimants to engage profitably in their business nor involved undue interference with their investment backed expectations for their property. *Lucas, supra,* at 1021.

Petitioner selectively cites to a footnote in *Keystone* which addresses the unexceptional proposition that the Fifth Amendment does not require compensation when an owner's use of property is injurious to the public and the state takes limited steps to abate the injurious use. Petitioners' Brief at page 5, citing *Keystone, supra,* at 491-92, n. 22 (citations omitted). When reviewed carefully, the cases cited in the footnote can also be distinguished from respondent's case.

First, in every case cited in the footnote, it is the owner's use of property which is deemed a public nuisance and therefore proscribed. In contrast, Petitioner's Nuisance Abatement Board seeks to close Respondent's property purportedly to curtail alleged drug use by someone other than the innocent property owner. Unlike the cases cited by Petitioner there is no evidence that Respondent consented to or participated in the activity deemed a public nuisance.

Second, in none of the cases cited in the footnote is the owner deprived of all economic use of his property; each considers less than *Bowen*'s total regulatory taking.[1] *See Nassar v. Commonwealth*, 394 Mass. 767, 477 N.E. 2d 987 (1985) (temporary occupation of a portion of property to conduct clean-up procedures of an unlicensed hazardous waste operation not

1. Significantly, Petitioner does not and cannot maintain that the action of its administrative board deprives Petitioner of anything less than all economic use of his property for one year; rather, Petitioner contends only that such complete deprivation does not require compensation under the state and federal constitutions.

compensable); *Kuban v. McGinsey*, 96 Nev. 105, 605 P.2d 623 (1980) (statute regulating brothels did not deprive operators of all reasonable use of their property and therefore was not compensable as a taking under the Fifth Amendment); *MacLeod v. Takoma Park*, 257 Md. 477, 263 A.2d (1970) (city's razing of fire damaged building does not constitute a taking under the Fifth Amendment); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965) (municipality's razing of dwelling deemed a fire hazard does not constitute a taking under the Fifth Amendment); *Pompano Horse Club, Inc. v. State ex rel. Bryan*, 93 Fla. 415, 111 So. 801 (1927) (property owner enjoined from using property as a race track for gambling operations not a taking under the Fifth Amendment); *People ex rel. Thrasher v. Smith*, 275 Ill. 256, 114 N.E. 2d 31 (1960) (property owner prohibited from using property as a "bawdyhouse" not a compensable taking).

II.

THE DISTRICT COURT OF APPEAL'S DECISION IS NARROWLY TAILORED, AND BASED UPON UNIQUE FACTS AND CIRCUMSTANCES, AND THUS DOES NOT AND CANNOT CREATE A "CONFLICT" WITH OTHER STATE COURT DECISIONS.

Finding Petitioner's specific order deprives Mr. Bowen of all economic use of his apartment complex, not merely specific property uses, the district court held that Petitioner's actions constituted a compensable taking under the fact specific circumstances. In doing so, it hardly "creates a conflict among state courts" or "discourage[s] all nuisance abatement boards in Florida from ordering a temporary closure of crackhouses, houses of prostitution, and dwellings used by street gangs." Indeed, the district court in *Bowen* acknowledges that government may abate common law nuisance, including illegal

conduct upon real properties. *Bowen, supra* at 629. Yet, as explained by the district court: "[T]he action of closing completely the apartments for one year was, in regard to Bowen's property rights, one of the most invasive methods of abating the purported nuisance that was available." *Id.* at 629. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, this Court recognizes that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas, supra* at 1017 (citations omitted). As such, according to *Lucas*, the property owner has suffered a taking compensable under the Fifth Amendment. *Id.*

As noted by Petitioner, numerous states have enacted nuisance abatement boards similar to those found in Florida. These boards attempt to provide for the public welfare by addressing the myriad of ills faced by our urban society and its citizens. The government, however, thorough a nuisance abatement board or otherwise, is prohibited by the Fifth Amendment of the United States Constitution from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan v. California Coastal Commission*, 483 U.S. 825, 835, n. 4 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The government may not take from the property owner, under the guise of regulation, core value of property, nor can it force a discrete minority or single individual to bear costs of public goods that should be born by the society as a whole. *Bowles v. United States*, 31 Fed. Cl. 37, 45 (1994). As the trial judge concluded in this case, if Petitioner wishes "to wage a war on drugs in part by means of this type of temporary taking then the city will be required to pay landowners just compensation." *Bowen, supra* at 632.

Petitioner cites a grab-bag of non-Florida state court opinions which ostensibly "conflict" with the opinion below.

As a preliminary matter, the alleged conflict of different state decisions, based on different facts and different state statutes, does not offer a basis for this Court's jurisdiction. Moreover, these decisions are factually inapposite to the case at hand, and thus do not provide support for Petitioner's argument. For instance, in *Minot v. Freelander*, 426 N.W. 2d 556 (N.D. 1988), the North Dakota Supreme Court upheld a lower court's decision declaring a private residence a public nuisance as a result of unsanitary conditions and building code violations. *Id.* at 559. To abate the nuisance, the house was demolished. *Id.* Of course, under these facts, the limited actions by the government did not amount to a taking compensable under the Fifth Amendment. *Id.* at 560; *see also Keystone*, *supra,* at 492 n. 22.

Similarly, in *Starzenski v. Elkhart*, 659 N.E. 2d 1132 (Ind. Ct. App. 1996), Indiana's highest court agreed that a homeowner's continued failure to remove garbage from private property warranted the city's limited action in entering the property and removing the debris. *Id.* at 1140-41. Such action, of course, did not constitute a "taking" under the Fifth Amendment. *Id.*

Minot and *Starzenski* merely hold the accumulation of trash on private property and the unsafe condition of buildings can constitute a common law nuisance and the government's limited action to abate such nuisances does not amount to a compensable taking, but instead is a simple exercise of the government's police power. *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887). Furthermore, in neither case did the government deprive the property owner of *all* economic use of their property. As noted in the appellate court in *Bowen*:

> In the present case, there is no common law nuisance being prevented by the closure. The prohibited activity was any use of the

> apartment building. The NAB order did not really proscribe any particular nuisance, such as would be done by enjoining the sale or use of drugs on the premises. Such an injunction would leave other legal uses available to the Plaintiff, but the order involved here left *no* use available.

Bowen, *supra* at 631 (emphasis supplied in original).

Finally, Petitioner cites *Raynor v. Maryland Department of Health and Mental Hygiene*, 110 Md. App. 165, 676 A.2d 978 (1996), wherein Maryland's highest court confirmed that a pet ferret's demise at the hands of officials in order to test it for rabies, after it had bitten a child, did not amount to a compensable taking under the Fifth Amendment. *Id.* at 991. The court concluded that the "taking is not compensable if it is effected as a result of a regulation that does no more than proscribe or abate an activity for which a property owner is not entitled to use his or her property." *Id.* at 989. Since a biting ferret is a public nuisance endangering human health, and the animal must be destroyed prior to testing for rabies, the court concluded that no compensable taking occurred. *Id.* at 992.

Contrary to the unfortunate "taking" of the ferret's life in *Raynor*, however, the Petitioner's order did significantly more than proscribe or abate "an activity for which a property owner is not entitled to use his or her property." *Id.* at 989. Indeed, Mr. Bowen was using his property as a rental apartment complex. "There is no common law nuisance doctrine that prohibits the use of a building for rental purposes." *Bowen*, at 631.

Under Petitioners' analysis, because Mr. Bowen's multi-unit apartment complex also allegedly served as the sight of several illegal drug purchases, the apartment complex constituted a

public nuisance and could be shut down entirely.[2] Rather than merely abate the purported nuisance (*i.e.*, the purported sale of illicit narcotics), Petitioner's Nuisance Abatement Board prohibited all uses of Respondent's property. Under such circumstances, the Florida appellate court correctly applies state and federal constitutional principles in concluding that Petitioner's complete deprivation of use requires just compensation to Respondent.

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2. Petitioner's Brief suggests that the "illegal activities" (*i.e.*, sale of illicit narcotics) purportedly occurring on Respondent's property constituted a public nuisance in Florida as far back as the early 19th century. (Petitioner's Brief, pp. 6-7). Under Petitioner's argument, activities that "tend to annoy the community or injure the health of its citizens in general, or to corrupt the public morals" should be considered public nuisances today. Of course, under this logic, a host of activities would be subject to abatement, including bars, sporting events and public television. But Petitioner confuses the illegal activities of isolated tenants and others with the Respondent's perfectly legal "use" of his property as an apartment complex. Indeed, Petitioner's' Nuisance Abatement Board order proscribed not merely the "illegal activities" purportedly constituting a public nuisance, but all use of the property. Contrary to Petitioner's belief, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), does not countenance a "public nuisance" exception under these facts.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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